ENTIRAN DURASAMY & OTHER APPLICATIONS v. PP

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[CRIMINAL APPLICATION NOS:
AA-44-19-04-2021, AA-44-20-04-2021,
AA-44-21-04-2021, AA-44-22-04-2021,
AA-44-28-05-2020, AA-44-30-05-2020,
AA-44-31-05-2020 & AA-44-36-06-2020]
2 NOVEMBER 2021
[2021] 10 CLJ JT(14)

CRIMINAL LAW: *Bail – Security offences – Blanket denial of bail to male offenders – Whether discriminatory – Whether violating non-gender discrimination provision of art. 8 of Federal Constitution – Applicant not in category of persons amenable to bail – Whether eligible for consideration for bail nonetheless – Maxim expressio unius est exclusio alterius – Applicability – Penal Code, s. 130(V)(1) – Security Offences (Special Measures) Act 2012, s. 13(2)(b) – Federal Constitution, arts. 5, 8, 9, 10, 13, 149*

STATUTORY INTERPRETATION: *Construction of statute – Interpretation – Section 13(2)(b) of Security Offences (Special Measures) Act 2012 – Security offence – Grant of bail – Word 'women' therein – Whether to include 'men' – Whether male offender under Act could be considered for bail*

STATUTORY INTERPRETATION: *Construction of statute – Laws enacted under art. 149 of Federal Constitution ('FC') – Security Offences (Special Measures) Act 2012 – Validity – Whether valid notwithstanding inconsistency with arts. 5, 9, 10, 13 of FC – Whether to be construed harmoniously with equality provision in art. 8 – Whether cannot be inconsistent with art. 8 – Security Offences (Special Measures) Act 2012, s. 13(2)(b) – Federal Constitution, arts. 5, 8, 9, 10, 13, 149*

CRIMINAL PROCEDURE: *Bail – Security offences – Second application for bail – Whether court functus officio – Failure by court in first application to consider possible discrimination and breach of art. 8 of Federal Constitution – Whether a jurisdictional omission – Whether an exception to functus officio rule – Whether present court could hear fresh application – Security Offences (Special Measures) Act 2012, s. 13(2)(b) – Federal Constitution, art. 8*

The eight men in these applications for bail were charged with an offence under s. 130V(1) of the Penal Code for being a member of an organised criminal group. It was undisputed that the offence charged, read with the provisions of the Security Offences (Special Measures) Act 2012 ('SOSMA') and the Criminal Procedure Code, was a security offence. It was also evident that (i) the application(s) here was the second of such applications, the first having been dismissed by another High Court ('the earlier court') except for one application (ii) s. 13(2)(b) of the SOSMA only allowed women and not

men to be considered for bail; and (iii) the applicants had raised the issue of the constitutionality and the discriminatory nature of s. 13(2)(b) before the earlier court, but that issue was not discussed nor decided upon by the said court. Be that as it may, before the learned Judicial Commissioner herein, the applicants regurgitated the constitutional attack on s. 13(2)(b), arguing in essence that the subsection had unlawfully discriminated against them, and that the wording of the subsection notwithstanding, they, as men, were equally entitled to be considered for bail. The Public Prosecutor, in opposing bail, retorted that the applications should stand dismissed as the applicants did not qualify for bail in law, and because the present court, on the facts, had become and been rendered *functus officio*.

Held (granting bail to applicants):

(1) Article 149 of the Federal Constitution ('FC') validates laws such as SOSMA or its s. 13 as to render them valid and lawful notwithstanding their inconsistency with the fundamental liberties provisions of arts. 5, 9, 10 or 13 of the FC. This said, this court must note that s. 13(2)(b) of SOSMA, having granted women the right to bail, cannot discriminate men against such right. Women are equally capable of committing SOSMA offences as men and no distinction should therefore be drawn as between them when granting bail under the Act. (paras 8, 12 & 13)

(2) There is no intelligible differentia as to why women but not men may be allowed bail when charged with a security offence under s. 13 of SOSMA. Such a blanket exception in favour of women is not only discriminatory and devoid of any rationale or reasonable classification or differentiation but goes against the non-gender discrimination or equality provision in art. 8 of the FC. The word 'women' in s. 13(2)(b), hence, must be defined as including 'men'. It follows that the applicants must be entitled to be considered for bail. (paras 9-13)

(3) Article 149 of the FC validates SOSMA even if it is inconsistent with arts. 5, 9, 10 and 13. The equality provision of art. 8 is housed together with arts. 5, 9, 10 and 13, but is, however, excluded from that class of fundamental liberties which SOSMA is allowed to be inconsistent with. The intentional exclusion is significant as it means that whilst SOSMA may be inconsistent with arts. 5, 9, 10 and 13 and remains valid, it cannot offend or be inconsistent with the fundamental right of equality enshrined in art. 8. This harmonious construction of the constitutional provisions finds support in the maxim *expressio unius est exclusio alterius*, as well as s. 41B(1) of the Dangerous Drugs Act 1952 which provides for a blanket restriction of bail irrespective of the gender of the accused. In the upshot, depending on the circumstances, men should not be discriminated against and should be similarly entitled to be considered for bail. (paras 19-22)

(4) The failure of the earlier court to discuss the issue of whether the applicants should similarly be entitled to bail like women under s. 13(2)(b) of SOSMA and should not be discriminated against in breach of art. 8 is a jurisdictional omission which amounts to an exception to the *functus officio* rule; it therefore enables this court to consider afresh the applications for bail herein. This said, upon the authority of *Koh Chin Wah v. PP*, this court is clothed with the jurisdiction and power to grant bail to the applicants although they were not in the categories of persons amenable to bail under s. 13(2) of SOSMA. (paras 27, 32 & 33)

(5) The court in the circumstances would grant bail of RM30,000 each to the applicants with the conditions that they provide two local sureties there for, be attached with the Electronic Monitoring Device, surrender their passport and other travelling papers, refrain from communicating with witnesses of their joint trial herein and report to the nearest Police Station once a week until any further order by the court. (para 34)

Case(s) referred to:

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1976] 1 LNS 19 FC ***(dist)***
Goh Leong Yong v. ASP Khairul Fairoz Rodzuan & Ors [2021] 8 CLJ 331 FC ***(foll)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347 FC ***(refd)***
Jimmy Seah Thian Heng & Ors v. PP & Other Applications [2018] 9 CLJ 769 HC ***(foll)***
Kanagasingam Anantham v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 7 CLJ 600 CA ***(refd)***
Koh Chin Wah v. PP (Criminal Application No. 07-13-11-2019 (W)) (Unreported) ***(foll)***
Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(refd)***
Md Nasir Uddin v. PP [2021] 6 CLJ 105 HC ***(refd)***
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***
Muraly Subramaniam v. PP [2021] 7 CLJ 794 HC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
PP v. Khong Teng Khen & Anor [1976] 1 LNS 100 FC ***(dist)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP lwn. Nasrun Effendi [2009] 3 CLJ 388 HC ***(refd)***
Raman Shunmugham lwn. PP [2020] 2 CLJ 818 CA ***(refd)***
Saminathan Ganesan v. PP [2020] 3 CLJ 398 HC ***(not foll)***
Suresh Kumar Velayuthan v. PP [2020] 4 CLJ 270 HC ***(foll)***
Tamil Selven Letchumenan v. PP [2019] 1 LNS 1542 CA ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***
Velmurugan Paniresilvam v. PP [2020] 1 LNS 1719 HC ***(refd)***
Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 9 CLJ 177 FC ***(refd)***

Legislation referred to:
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 26A
Criminal Procedure Code, ss. 278, 388(1)
Dangerous Drugs Act 1952, s. 41B(1)(a), (b), (c)
Federal Constitution, arts. 5, 8(1), (2), 9, 10, 13, 121, 149(1)(f)
Penal Code, s. 130V(1)
Security Offences (Special Measures) Act 2012, s. 13(2)(b), First Schedule

For the respondent - Mohd Sabri Othman, Nur Ainaa Ridzwan & Adip Sabir Abdullah; DPPs
For the 1st, 2nd & 4th accused - Noorfarihah Arshad; M/s Nurul & Charan
For the 3rd accused - Ashok Athimulan & Noorfarihah Arshad; M/s Nurul & Charan
For the 5th, 6th, 7th & 8th accused - Nahtan N Krishnan; M/s Naht, Guna & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Su Tiang Joo JC:

Introduction

[1] There are eight applications for bail before the High Court ("court"). The Public Prosecutor who is the respondent in all eight applications opposes all the applications on the following grounds:

(i) this is the second application; and

(ii) the applicants do not qualify for bail pursuant to s. 13 of the Security Offences (Special Measures) Act 2012 (Act 747) ("SOSMA").

Background

[2] Each of the eight applicants together with two others making a total of ten accused persons are severally charged under s. 130V(1) of the Penal Code for being a member of an organised criminal group named "Kumpulan Viki Naidu". Section 130V(1) provides that whoever is a member of an organised criminal group shall be punished with imprisonment for a term of not less than five years and not more than 20 years. Although severally charged, they are being tried together and their joint trial is currently ongoing.

Court's Analysis And Findings

[3] The court will deal with each of the assertions put forward by the applicants and the respondent in no particular order.

(i) Constitutionality Of S. 13 Of The SOSMA

[4] The provisions of s. 13 of the SOSMA are reproduced below:

> (1) Bail shall not be granted to a person who has been charged with a security offence.
>
> (2) Notwithstanding subsection (1):
>
> (a) a person below the age of eighteen years;
>
> (b) a woman; or
>
> (c) a sick or an infirm person,
>
> charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[5] With all due respect, the court is not persuaded to follow the authority of *Saminathan Ganesan v. PP* [2020] 3 CLJ 398; [2020] 7 MLJ 681 (HC) that s. 13 of the SOSMA is unconstitutional premised on the argument that art. 121 of the Federal Constitution which provides the judicial power to grant bail has been taken away. Such power can be taken away as can be seen in the provisions of s. 41B(1) of the Dangerous Drugs Act 1952 (Act 234) ("DDA"), which I will discuss further below.

[6] On a related note, on the separation of powers and basic structure doctrine argument raised by Mr Charan Singh, the former lead counsel for (i) Ganesan a/l Durasamy; (ii) Velmurugan a/l Paniresilvam; (iii) Entiran a/l Durasamy; and (iv) Ganasen a/l Kupusamy that judicial power including that to grant bail cannot be taken away and although the Federal Court would probably have to revisit this issue arising from its decision in *Koh Chin Wah v. PP* (*infra*) and the decision of the Court of Appeal in *Tamil Selven Letchumenan v. PP* (*infra*), this court is bound by the latest Federal Court decision in *Goh Leong Yong v. ASP Khairul Fairoz Rodzuan & Ors* [2021] 8 CLJ 331, which rejected such argument, and I quote the following excerpt from the majority decision handed down by Her Ladyship, Zabariah Mohd Yusof FCJ:

> [88] On the basic structure doctrine, the majority judgments in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579, *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 4 CLJ 1; [2021] 3 MLRA 260 and *Zaidi Kanapiah* (*supra*) have addressed this doctrine extensively by referring to the judgment of the learned Raja Azlan Shah FJ in *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 and Suffian LP in *Phang Chin Hock v. PP* [1979] 1

LNS 67; [1980] 1 MLJ 70, which had consistently rejected the doctrine. It is already settled that [the] basic structure doctrine has no place in our jurisprudence. Therefore, I will not dwell on it in this judgment.

[7] I also quote the following excerpts from the judgment of His Lordship, Abdul Rahman Sebli FCJ who wrote the supporting judgment in *Goh Leong Yong* (*supra*):

> [140] … To remove judicial power from the two High Courts means to take away judicial power from the two High Courts and leaving them with no judicial power to exercise.
>
> [141] That cannot be factually correct. Judicial power has never been removed from the two High Courts and will remain vested in the two High Courts for as long as art. 121(1) is still embedded in the Constitution …
>
> [143] The truth is, judicial power has never been removed from the two High Courts at any time either before or after the amendment to art. 121(1). The removal of judicial power from the two High Courts can only be done by removing the whole of art. 121(1) from the Constitution, and not merely by removing those few words from the article although, admittedly, they are words of significant import.

[8] Instead, this court agrees with the principle enunciated by His Lordship, Collin Lawrence Sequerah J in the High Court case of *Suresh Kumar Velayuthan v. PP* [2020] 4 CLJ 270 (HC) that art. 149(1)(f) of the Federal Constitution validates laws passed notwithstanding that it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13 and that the SOSMA and in particular s. 13 thereof is valid and lawful.

[9] However, with respect, where I differ is when men are discriminated from being granted bail when such a right is given to women under s. 13(2)(b) of the SOSMA. Such discrimination goes against the non-gender discrimination provision housed within the fundamental liberty of equality which is expressly provided in art. 8(1) and (2) of the Federal Constitution as reproduced below:

> 8(1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) **Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of** religion, race, descent, place of birth or **gender in any law** or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> (emphasis added)

[10] By reason thereto, so as to provide an interpretation that is in harmony with the supreme law housed within the Federal Constitution, in my view, the word "women" in s. 13(2)(b) of the SOSMA includes "men". Applying such a construction, the applicants who are all men should similarly be entitled to be considered for bail. See the Federal Court decision of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701, where Augustine Paul JCA (who retired as FCJ) in delivering the judgment of the Federal Court said:

> If art. 160(2) is not interpreted together with s. 3(1) it would render the section otiose in so far as its power to modify the common law in the future is concerned. This will militate against *one of the recognised canons of construction of a Constitution which is that if two constructions are possible the Court must adopt the one which will ensure the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory (see State of Punjab v. Ajaib Singh* AIR [1953] SC 10). (emphasis added)

[11] In opposing the applications for bail, the respondent relied upon the case of *PP v. Khong Teng Khen & Anor* [1976] 1 LNS 100; [1976] 2 MLJ 166, where the Federal Court held that the law may classify persons into children, juveniles and adults and provide different criteria for determining liability or the mode of trying them or punishing them if found guilty. And, that the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class. The case of *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 (FC) was also cited where it was held that discriminatory law is good law if it is based upon reasonable or permissible classification or founded on intelligible differentia.

[12] However, with respect, in my view there is no intelligible differentia as to why men should not be allowed bail when women are allowed bail under s. 13(2)(b) of the SOSMA when charged for a security offence, the security offence in this case being an offence under s. 130(V)(1) of the Penal Code. Such a blanket exception in favour of women is discriminatory against men. Women are as equally capable of committing security offences under the SOSMA as men. Such discrimination, to my mind, would not qualify as a rational or reasonable classification or differentiation. Indeed, to drive home the point, there is no provision at all in the SOSMA that women cannot be charged for any security offences under this Act. The very fact that there is a provision for bail for women under s. 13(2)(b) of the SOSMA would logically drive anyone to conclude that women are capable of committing security offences and are equally liable to be charged for the same.

[13] I am aware that this would result in there being no distinction to be drawn between women and men when granting bail and the answer lies in art. 8 of the Federal Constitution.

[14] The Constitution (Amendment) (No. 2) Act 2001 (Act A1130), which came into force on 28 September 2001 made amendments, *inter alia*, to art. 8(2) of the Federal Constitution by introducing the word "gender". Wherefore, with respect, in my view, the law that flows from the cases that were decided prior to 28 September 2001, such as *PP v. Khong Teng Khen* (*supra*) and *Datuk Hj Harun Idris Hj Idris v. PP* (*supra*), which were relied upon by the respondent must be distinguished and applied with great circumspection. For ease of reference, s. 3 of the Constitution (Amendment) (No. 2) Act 2001 (Act A1130) is reproduced below:

> The Federal Constitution is amended in Article 8 in Clause (2) by substituting for the words "descent or place of birth" the words "descent, place of birth **or gender**. (emphasis added)

[15] I observed that the non-gender discrimination provision housed in art. 8 of the Federal Constitution were not canvassed in the authorities relied upon by the respondent, such as *Suresh Kumar Velayuthan v. PP* [2020] 4 CLJ 270 (HC) and *Md Nasir Uddin v. PP* [2021] 6 CLJ 105 (HC) in support of the bail applications which were dismissed.

[16] In a similar vein, the debate in Parliament as shown by Hansard did not seem to touch on this aspect on why the right to be considered for bail is given to women but not to men.

[17] Just like in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701, where the Federal Court referred to *Ong Ah Chuan v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64, where Lord Diplock stated: "Equality before the law and equal protection of the law require that like should be compared with like …". I observe that there is no distinction regarding the offences under the SOSMA on whether they are offences that may be committed by different kinds of gender so as to be visited by different types of punishment.

[18] The security offences listed in the First Schedule of the SOSMA are offences under Chapters VI (Offences against the State), VIA (Offences relating to terrorism) and VIB (Organized crime) of the Penal Code; Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) (Offences under Part IIIA on smuggling of migrants) and Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770).

[19] It is pertinent to observe that the SOSMA is a law enacted pursuant to art. 149 of the Federal Constitution and where such law is valid notwithstanding that it may be inconsistent with any of the provisions of the fundamental liberties enshrined in arts. 5, 9, 10 or 13 of the Federal Constitution (hereinafter referred to as the class of "excluded fundamental liberties") but significantly, the fundamental liberty of equality under art. 8 of the Federal Constitution is not included in the class of excluded fundamental liberties. This intentional omission drives me to hold that the

laws made under art. 149 cannot be inconsistent with the fundamental right of equality enshrined in art. 8. Such an omission clearly does not make it fall within the qualifying provision of art. 8, which provides "Except as expressly authorised by the Constitution". And, seeing that art. 8 is housed within Part II on Fundamental Liberties of the Federal Constitution together with arts. 5, 9, 10 and 13, it would be apt to also apply the maxim *expressio unius est exclusio alterius* (when one or more things of a class are expressly mentioned, others, of the same class are excluded) (see para. [26] of the Federal Court decision of *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347) and this court ought to construe the law enacted under art. 149 to be in harmony with the fundamental liberty provisions of equality under art. 8.

[20] I draw further support for such a construction from s. 41B(1) of the DDA, which provides a blanket restriction on bail irrespective of the gender of the accused. This means that bail is not to be granted to an accused person charged with an offence under the DDA as stated below:

> (1) …
>
> (a) where the offence is punishable with death; or
>
> (b) where the offence is punishable with imprisonment for more than five years; or
>
> (c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

[21] In s. 41B(1)(a), (b) and (c) of the DDA, there is no gender discrimination against the restriction on bail, see *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285, where Raja Azlan Shah CJ Malaya (as His Majesty then was) delivering the judgment for the Federal Court denied bail to the appellant, a woman who was then pregnant. Even a sick or infirm person would not be amenable to bail, see *Muraly Subramaniam v. PP* [2021] 7 CLJ 794 (HC), where the accused was charged with drug trafficking and if convicted would have faced the death penalty was denied bail even though he was suffering from end-stage renal failure.

[22] However, in s. 13(2)(b) of the SOSMA there is a relaxation on bail for a security offence where it allows women who may be charged under s. 130V(1) of the Penal Code to be amenable to bail despite it being a security offence under the SOSMA. On this ground, I find that men should not be discriminated against and should similarly be entitled to be considered for bail depending on the circumstances of the case, ie, on a case-by-case basis, for example, whether the applicant is a flight risk.

[23] On the two articles relied upon by the respondent namely: (i) *"Report no. 48 – Releasing the Female Accused on Bail"* by Law and Justice Commission of Pakistan; and (ii) "*Women and Detention"* published by Women Human Rights and Gender Section, OHCHR Rule of Law, Equality and Non-Discrimination Branch, to support its assertion on why an accused who is a woman should be allowed bail by highlighting the difficulties encountered by females in prison; one of which discusses the conditions of the prisons in Pakistan, with due respect, I do not find them helpful in assisting the court because there is no evidence before the court to safely conclude that the conditions of the prisons in Malaysia for women are worse off compared to the prisons for men so as to justify that women who are accused of security offences under the SOSMA are entitled to rights such as bail to which men are deprived of. The fallacy of the respondent's argument is exposed when tested against logic, *cessante ratione legis cessat ipsa lex* (reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself). Taken to its logical conclusion, the respondent's argument would suggest that women should not be incarcerated at all. However, there is no law which excuses women from being sentenced to imprisonment purely on the ground of gender. Therefore, the argument that a particular gender can be allowed bail prior to a finding of conviction but another gender cannot, flies in the face of the fundamental liberty provision of equality.

(ii) Functus Officio And Res Judicata

[24] The respondent has pointed out that these applications before the court is the second of such applications made by the applicants. The question that this court is now faced with is "Is the court *functus officio*?".

[25] In *PP lwn. Nasrun Effendi* [2009] 3 CLJ 388; [2008] 4 MLJ 272 (HC), His Lordship, Mohd Zawawi Salleh PK (now FCJ) made reference to s. 278 of the Criminal Procedure Code (Act 593) ("CPC") which provides that "No court, other than a High Court, having once recorded its judgment, shall alter or review the same ...". See also *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 (CA).

[26] However, there are exceptions to the *res judicata* rule which encompasses the *functus officio* rule, see *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553; [2000] 1 MLJ 479 (CA). The exception which is relevant to this case would be where the tribunal or the court (often inadvertently) did not fully carry out all the basic functions which were its duty to perform, so that it can be said that some fundamental function remains unfulfilled and which amounts to jurisdictional error, see *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537 (FC).

[27] In the earlier application for bail by all ten accused, His Lordship, Mohd Radzi Harun J who heard six of the applications had granted bail to V Vigneswaran Naidu a/l Venkatararema Naidu who was one of the ten accused on the grounds that he is a sick and infirm person. However, another

accused who had also applied for bail on the same grounds together with other grounds, had his application dismissed, see *Velmurugan Paniresilvam v. PP* [2020] 1 LNS 1719; [2020] MLJU 1965 (HC). The other grounds relied upon by Velmurugan were that as follows: (i) he is innocent until proven guilty and should be entitled to bail consonant with art. 8 of the Federal Constitution; (ii) the SOSMA charge is without merit as the applicant was suspected of being involved in drug-related activities which do not come under the definition of security offences under the SOSMA and under s. 388(1) of the CPC, where the court is still empowered to grant bail to a non-bailable offence. Notably, the issue of whether the applicant who is a man should similarly be entitled to bail like women under s. 13(2)(b) of the SOSMA and should not be discriminated against in breach of the fundamental liberty provision encapsulated in art. 8 **was not** (emphasis added) discussed and decided upon. Instead, on the premise that the applicant does not come within the three categories of persons under s. 13(2)(b) of the SOSMA, bail was denied with reference made to *Raman Shunmugham lwn. PP* [2020] 2 CLJ 818 (CA). This, to my mind, with the greatest of respect, amounts to a jurisdictional omission which would be an exception to the *functus officio* rule enabling this court to consider the fresh applications before this court. In other words, from the facts of this case, the exception to the *functus officio* rule applies and this court is at liberty to hear these fresh applications for bail.

[28] There is a further reason, that is, the circumstance has changed since the earlier application for bail. To the credit of the team of learned DPPs, they candidly admitted that in *Koh Chin Wah v. PP* (Criminal Application No. 07-13-11-2019 (W)) (the case number was supplied by the learned DPPs in their written submissions in E13 under sub-heading (vi) and para. 119) bail was given by the Federal Court to a man charged for carrying out smuggling of migrants under s. 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670), which is a security offence under the First Schedule of the SOSMA.

[29] However, the prosecution submitted that the decision in *Koh Chin Wah* (*supra*) is not binding on this court because no grounds of judgment have been handed down by the Federal Court with reliance placed upon *Kanagasingam Anantham v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 7 CLJ 600 (CA); *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731 (FC); and *Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 9 CLJ 177 (FC).

[30] By analogy to the principle laid down in the celebrated case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, where the Federal Court stated that "if the prosecution's evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused". By a similar analogy where a

decision of the Federal Court admits of two or more inferences, one of which is in favour of the accused, then it is the duty of this court to draw an inference that favours the accused, especially when a decision on bail may not be amenable to appeal, see *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 (CA).

[31] Although no grounds of judgment were given by the Federal Court in *Koh Chin Wah v. PP* (*supra*), this court ought not to cover its ears to the undisputed fact that our apex court, the Federal Court, had granted bail to a male applicant who was charged with a security offence listed under the First Schedule of the SOSMA and by reason of which s. 13 of the SOSMA would apply. It can be safely inferred from this decision of the Federal Court that the court has the jurisdiction and power to grant bail to a male person charged with a security offence listed under the First Schedule of the SOSMA although he may not be in the categories of persons amenable to bail under s. 13(2) of the SOSMA. Wherefore, with all due respect to the respondent, this court would draw an inference favourable to the applicants based on the decision of the Federal Court in *Koh Chin Wah v. PP* (*supra*), where the panel of judges consisting of the Chief Justice, the President of the Court of Appeal and a very senior Federal Court Judge, Vernon Ong FCJ presided over the case.

Conclusion

[32] Wherefore, I am of the opinion that the applicants are entitled to be considered for bail and it has been held in *Tamil Selven Letchumenan v. PP* [2019] 1 LNS 1542 (CA), where His Lordship, Abdul Rahman Sebli JCA (now FCJ) in delivering the judgment of the Court of Appeal said at para. [11]: "… that notwithstanding the absence of such application by the Public Prosecutor, the courts are still vested with the discretion to grant or not to grant bail to any of the classes of persons enumerated in s. 13(2) of SOSMA".

[33] Having decided that men are equally entitled to the right to be considered for bail, and guided by the case of *Jimmy Seah Thian Heng & Ors v. PP & Other Applications* [2018] 9 CLJ 769; [2019] 7 MLJ 308 (HC), where His Lordship, Collin Lawrence Sequerah J held that courts can impose whatever conditions of bail deemed fit, I will now consider the same. In this regard, I then called upon the learned Deputy Public Prosecutor ("DPP") and learned counsel for the applicants to address the court on why in the particular circumstance of each applicant, save and except purely on the ground of gender, bail ought to be denied and if allowed, the proposed terms to be imposed for bail.

Bail

[34] After hearing the learned DPP and learned counsel for the applicants, the court grants bail of RM30,000 for each applicant and the following conditions apply:

(i) to provide two local sureties;

(ii) the applicant must be attached with an electronic monitoring device ("EMD");

(iii) the applicant's passport and all travelling papers are to be surrendered to the court;

(iv) the applicant must not communicate in any way whatsoever including but not limited to communication in person, by telephone, email, WhatsApp or by any social media, with any of the witnesses of the joint trial herein and this include any family members of the witnesses until the disposal of the trial;

(v) the applicant must report to the police station nearest to his home at least once a week until he is discharged and acquitted or until further order by the court; and

(vi) the EMD that is to be attached to the leg of each of the applicant is subject to the following conditions:

(a) the movements of each of the applicants are to be recorded and kept as part of official records;

(b) the applicants are required to report, if required, on the condition of the EMD;

(c) an applicant who changes his residence is to notify the nearest police station of his new address;

(d) the applicants must comply with any procedure on the use of the EMD as may be set by a police officer;

(e) each applicant must allow any police officer to inspect the EMD affixed to him and to report to the nearest police station for the process of removing and returning the EMD in good condition to a police officer as and when required; and

(f) the applicants must comply with any directions as may be given by the court.